Tri-State Building & Construction Trades Council, AFL–CIO *and* Stark Electric, Inc.

The Tri-State Contractors Association *and* Stark Electric, Inc. Cases 9–CC–1104–1 and 9–CE–44

June 30, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On January 25, 1982, Administrative Law Judge Peter F. Donnelly issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief, and the General Counsel filed limited exceptions[1] with a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent Tri-State Building & Construction Trades Council, AFL–CIO, Ashland, Kentucky, it officers, agents, and representatives, and Respondent Tri-State Contractors Association, Ashland, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] In view of our adoption of the Administrative Law Judge's finding that the self-help provision of art. II, sec. 7, arbitration and grievance clause, of Respondents' collective-bargaining agreement violates Sec. 8(e) of the Act, we find that it is cumulative and unnecessary to consider the General Counsel's exception that art. III, steering committee clause, of Respondents' collective-bargaining agreement also provided for impermissible self-help and further violated Sec. 8(e) of the Act. Member Fanning dissents from the conclusion that the self-help provision violated Sec. 8(e) as such and, consequently, also would dismiss the 8(b)(4)(A) allegations.

[2] Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge: The original charge herein (Case 9–CC–1104–1) was filed on March 16, 1981, by Stark Electric, Inc., herein called Stark, and amended on April 10, 1981. The charge in Case 9–CE–44 was filed by Stark on April 10, 1981. On April 23, 1981, an order consolidating cases, consolidated complaint and notice of hearing issued and on June 15, 1981, an order consolidating cases, consolidated amended complaint, and notice of hearing issued, alleging that Tri-State Contractors Association, herein called Respondent Association or Association, and Tri-State Building & Construction Trades Council, AFL–CIO, herein called Respondent Council or Council, violated Section 8(e) of the Act by entering into a labor agreement containing a hot cargo provision. Further, that Respondent Council through Business Manager Douglas Blankenship violated Section 8(b)(4)(ii)(A) and (B) of the Act by threatening to picket a job of Ike Stephens and Sons Construction Co., a general contractor, herein called Stephens, if Stephens utilized the services of Stark as a subcontractor. An answer thereto was timely filed by Respondent Council and pursuant to notice a hearing was held before an administrative law judge at Huntington, West Virginia, on June 18, 1981. Briefs have been timely filed by Respondent Council and General Counsel which have been duly considered. In the absence of objection thereto, General Counsel's motion to correct the record is hereby granted.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

The complaint alleges that Stark, an electrical contractor in the construction industry, during the past 12 months, performed services valued in excess of $50,000 for customers located outside the State of West Virginia. The complaint also alleges Respondent Council and its various members, including Stephens, both individually and collectively, annually perform services valued in excess of $50,000 directly for enterprises located in States other than the States in which said members are located. The complaint alleges, the answer admits, and I find that Stark, Stephens, and Respondent Association are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that Respondent Council is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Hot cargo provisions

On or about June 1, 1979, Council and Association entered into a multicraft labor agreement effective June 1,

1979, to May 31, 1982. The following provisions thereof are alleged to violate Section 8(e) of the Act:

> Article II. Section 7. Arbitration and Grievance Clause: (Part 2) Grievances or disputes must be processed within the time limits set out in these sections or such grievances or disputes will be considered to have been satisfactorily settled and cannot be again filed. Violation concerning wages and health and welfare payments shall not be subject to arbitration. It is agreed that there shall be no suspension of work either by strike or lockout until the foregoing grievance procedure has been exhausted.
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> Article II. Section 16. Sub-Contract Clause: The Employer shall not sub-contract such work nor utilize on the jobsite the services of any other person, company or concern to perform such work that does not observe the same wages, fringe benefits, hours, and conditions of employment as enjoyed by the employees of all local unions affiliated with the Tri-State Building and Construction Trades Council as negotiated in said local unions' collective bargaining agreements.
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> Article III. Steering Committee. There shall be a Steering Committee composed of an equal number of Council and Association representatives with no less than four (4) representatives for each side. All disputes concerning the meaning and interpretation of this agreement shall be referred to the Steering Committee for review and possible resolution.
>
> In the event that the Steering Committee shall decide the matter expeditiously and by unanimous vote, its decision shall be final and binding. In the event that the Steering Committee shall be divided or shall fail to decide the matter within seventy-two (72) hours of notification of the dispute, the individual local union and the employer shall be free to pursue such courses of economic or other action as are permitted by their individual supplemental agreement. In the event an employer is confronted by an emergency situation, he may refer the matter to the Steering Committee for its assistance in resolution of the matter.

2. The threat of picketing

In late 1980 or early 1981,[1] Home Federal Savings and Loan Co., herein called Home Federal, solicited bids from general contractors for alterations and an addition to a building in Ashland, Kentucky. On Friday, February 24, Stephens, as general contractor, submitted a bid on the project listing Stark as the electrical subcontractor, since Stark's bid on the electrical work was the lowest. Stark is not a member of the Association, nor a party to the Council-Association contract; however, its employees are represented, under contract, by the United Steel Workers of America, herein called Steel Workers, a noncraft union and not a member of the Council, nor a party to the Council-Association contract. The bids were opened at 2 p.m. on February 24, which disclosed Stephens as the low bidder.

Upon learning that Stark had been named in the bid as the electrical subcontractor, Blankenship made a telephone call on February 25 to Stephens' office and spoke to Gary Owens, the office manager. Blankenship identified himself and informed Owens that it was his understanding that Stephens had used Stark as the electrical subcontractor on the Home Federal job bid. Blankenship also advised Owens that Stark was not a member of the Association and that if they continued to use Stark he would picket the job. Owens testified that "He had just simply said that if we used Stark on the job, that there would be a picket line by all trades, a picket by all trades on the job. On the Home Federal job." Owens testified that he was aware that using Stark as a subcontractor could create problems with the Council, and he told Blankenship that they would see what they could do. Owens then spoke by telephone to Ike Stephens, owner of Stephens, who advised him to speak to the owners' representative on the job, the architect, William Welch, and tell him about the conversation with Blankenship. Owens then called Welch and told him about his conversation with Blankenship, and Welch intimated that he would resolve the problem.

On February 26, Welch called Owens and told him that the owners had approved the use by Stephens of the next lowest electrical contractor bid at an additional cost of $9,000.[2] A construction contract providing for the additional $9,000 and the substitution of Stull for Stark was drawn up and executed on March 3.

Blankenship concedes that he spoke to Owens, but denies that he ever threatened to picket the Home Federal job. Blankenship's version of the conversation is that when he became aware that Stark was a bidder on the Home Federal job he called Owens and told him that subcontracting to Stark would cause problems because Stark had a contract with the Steel Workers, not a building and construction trades union, and that Stephens was thereby violating the subcontracting clause (art. II, sec. 16) of the Council-Association contract. Blankenship testified that he advised Owens that he would take legal action to enforce the subcontracting clause of the Council-Association contract. To the extent that their versions of the conversation differ, I conclude that Owens' version of the conversation is the more accurate, particularly in view of the fact that Stephens, by whom Owens was employed, was an Association member, a signatory to the Council-Association contract, and Owens would have little to gain by testifying adversely to the Council or its representative, Blankenship.

B. *Discussion and Analysis*

1. The hot cargo provisions

General Counsel contends that the subcontracting clause of the Council-Association contract (art. II, sec. 16) violates Section 8(e) of the Act since it is secondary rather than primary in nature, and that the "Arbitration

[1] All dates refer to 1981, unless otherwise indicated.

[2] This was Stull Electric Co., herein called Stull.

and Grievance" and "Steering Committee" provisions are essentially self-help provisions which deprive the subcontracting provision of whatever protection it may have had under the terms of the construction industry proviso to Section 8(e).[3]

In deciding whether or not the subcontracting clause violates Section 8(e) of the Act, we must first decide whether the subcontracting clause is primary or secondary in nature. If primary, then Section 8(e) has no application whatever, the cause is lawful and the complaint should be dismissed.

The Council contends that the subcontracting clause herein is a lawful, primary, "area standards" type of provision. In this regard, the Board has held that "area standards" subcontracting provisions are lawful and primary to the extent that they apply only to economic items to ensure that the economic benefits enjoyed by employees in the area are adhered to by subcontractors in their economic relationships with their employees while engaged in work within the geographical area covered by the agreement. The legitimacy of this type of provision derives from what the Board has traditionally viewed as a legitimate interest on the part of unions in preventing subcontracting to employees who do not meet prevailing wage and employee benefits. Thus, "area standards" clauses have been viewed as primary rather than secondary.

However, if the subcontracting clause runs to noneconomic items which have the effect of requiring a subcontractor to adhere to working conditions unrelated to economic benefits, the clauses will be viewed as secondary in nature and thus within the proscription of Section 8(e).

In the *Dimeo Construction Co.* case,[4] the Board was required to construe a stipulated interpretation of subcontracting language which allowed subcontracting only to subcontractors who abide by "union standards of wages, hours, and working conditions." The Board, in concluding that this language was secondary in nature, within the meaning of Section 8(e) of the Act, held that:

> "Working conditions" necessarily refer to the working conditions prescribed by the same agreement. In the absence of evidence to the contrary, we therefore construe the stipulation as requiring a subcontractor to adhere not only to the agreement's wage and hour provisions, but also to other contract working conditions, which may or may not be economic in nature.

Likewise the clause in issue in the instant case prohibits subcontracting to employees who do not observe, among other things, the same "conditions of employment" as enjoyed by the employees of all local unions affiliated with the Tri-State Building & Construction Trades Council, as negotiated in said local unions' collective-bargaining agreements.[5]

It is my conclusion that the term "conditions of employment" is so broad as to encompass noneconomic provisions of the I.B.E.W. Local 317 contract. Accordingly, I conclude that the subcontracting clause of the instant contract is secondary under the terms of Section 8(e) of the Act.

However, this does not dispose of the matter, since while the subcontracting clause in issue is secondary, it may still be lawful under the construction industry proviso to Section 8(e), exempting jobsite work. It is apparent that the subcontracting clause in issue is limited to work performed on the jobsite. However, where the terms of the contract provide for nonjudicial enforcement of the subcontracting clause by economic means, including strikes and picketing, the proviso exemption is lost; rendered unlawful by the self-enforcement provision. *District Council of Carpenters of Portland, et al. (Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.)*, 243 NLRB 416 (1979).

An examination of the contract between the Council and its affiliates, including I.B.E.W. Local 317, on the one hand, and the Association and its members on the other hand, discloses two areas General Counsel contends to be self-help provisions. These are the grievance-arbitration and steering committee provisions, both set forth above.

Turning first to the grievance and arbitration provisions, it is clear that, as written, they encompass "any trouble of any kind."[6] Clearly this would seem to apply to those instances wherein the Council or an affiliate local union, such as I.B.E.W. Local 317, were attempting to require a contractor to subcontract under the restrictive terms of the Council-Association contract, which I have concluded is secondary in nature. As applied to such a dispute, it appears that a suspension of work by either strike or lockout is envisioned after the grievance-arbitration procedures have been exhausted; perhaps as a means to enforce a favorable arbitration award. The Council or an affiliated union would be entitled to strike

[3] Sec. 8(e) and the jobsite proviso read as follows:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work . . . .

[4] *Local 437, International Brotherhood of Electrical Workers, AFL-CIO, et al. (Dimeo Construction Co.)*, 180 NLRB 420 (1969).

[5] It is undisputed that I.B.E.W. Local 317 is the electrical construction trades local union servicing the Tri-State geographical area, under its contract with the West Virginia-Ohio Valley Chapter, N.E.C.A., Huntington Division, and is affiliated with the Council.

[6] Art. II, sec. 7, of the arbitration and grievance clause (part I), reads, in pertinent part:

Should difference arise between the Employer and an employee covered by this Agreement, as to the meaning and application of the provisions of this Agreement, or should any trouble of any kind arise, there shall be no suspension of the work on account of such differences, caused by either the Employer or the Union and the conditions in effect at the time the difference arises shall be continued by the parties, but such differences or disputes shall be settled in the following manner. . . .

at that time. To this extent the contract does contemplate or permit the use of self-help to enforce the subcontracting arrangement of article II, section 16 of the Council-Association contract. Such self-help provisions removed the protection afforded by the first proviso to Section 8(e). *District Council of Carpenters of Portland (Pacific Northwest Chapter of Associated Builders and Contractors, Inc.), supra; General Drivers, Warehousemen and Helpers of America, Local Union No. 89, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Robert E. McKee, Inc.)*, 254 NLRB 783 (1981).

With respect to the Steering Committee article, this appears to be a method of resolving "all disputes concerning the meaning and interpretation of this agreement. . ." and as written it would encompass the Council's or affiliated unions' disputes with a subcontractor concerning the subcontracting of work under the Council-Association contract. Upon the failure or the inability of the Steering Committee to resolve the matter the parties are left "free to pursue such courses of economic or other action as are permitted by their individual supplemental agreement."[7] However, I.B.E.W. Local 317 has no individual supplemental agreement (labor contract) with Stark. Indeed, Stark has a contract with the Steel Workers. In these circumstances, there would be no "individual supplemental agreement" to examine in order to determine what action could have been resorted to thereunder if it had existed. The dispute is left in limbo.

General Counsel contends that since a subcontractor like Stark has no access to the grievance procedure of the "individual supplemental agreements," that the Council or affiliated unions are free to engage in economic action to enforce the subcontracting provisions of the Council-Association contract. I do not agree. Whether the Steering Committee provision constitutes self-help depends entirely on the content of various "individual supplemental agreements" which cannot be prejudged as rendering the Steering Committee provision a self-enforcement or self-help provision. Such agreements might provide for legitimate noneconomic or judicial action to resolve the dispute. As written, the Steering Committee provision is not a self-help provision and, in the instant case, the fact that the grievance-arbitration provisions of the I.B.E.W. Local 317 contract are not available to Stark makes the Steering Committee clause meaningless but, nonetheless, not a self-help clause.

In summary, and in agreement with General Counsel, I conclude that article II, section 7, of the arbitration and grievance clause (part 2) authorizes the use of economic means, specifically strikes, in order to enforce article II, section 16. Such self-enforcement language effectively deprives that part of the article, to that extent, from any protection it might otherwise have enjoyed under the first proviso to Section 8(e) of the Act.

I also conclude that article III, steering committee, does not contain self-enforcement language, and I am not persuaded by General Counsel that any self-enforcement meaning can be read into it.

[7] I.B.E.W. Local 317's contract with the West Virginia-Ohio Valley Chapter, N.E.C.A., Huntington Division, provides for grievance and arbitration of such disputes.

2. The threat of picketing

As noted earlier, in crediting Owens, I have essentially concluded that Blankenship threatened to picket the Home Federal job if Stephens subcontracted the electrical work on that job to Stark in violation of the Council-Association contract.[8] Clearly this constitutes a threat to picket for using what the Council viewed as a nonunion subcontractor. Such a threat has an unlawful secondary object within the meaning of Section 8(b)(ii)(A) and (B) since it was essentially a threat to force Stephens to adhere to and reaffirm the unlawful 8(e) provision of the Council-Association contract, and to cease doing business with Stark.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents set forth in section III, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondents have engaged in, and are engaging in, certain unfair Labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Ike Stephens and Sons Construction Co., Stark Electric, Inc., and Tri-State Contractors Association are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Tri-State Building & Construction Trades Council, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By entering into, maintaining, and giving effect to the self-help provisions applicable to article II, section 16, subcontract clause, of their June 1, 1979, to May 31, 1982, multicraft agreement, Tri-State Building & Construction Trades Council, AFL–CIO, and Tri-State Contractors Association violated Section 8(e) of the Act.

4. By threatening to picket Ike Stephens and Sons Construction Co., with an object of forcing it to observe and reaffirm the June 1, 1979, to May 31, 1982, multicraft agreement, and to cease doing business with Stark Electric, Inc., Tri-State Building & Construction Trades Council, AFL–CIO, engaged in coercion in violation of Section 8(b)(4)(ii)(A) and (B) of the Act.

[8] This credibility resolution is made based on the evidence adduced in the instant hearing alone, and accordingly I find it unnecessary to pass upon General Counsel's request, made on his brief, to take judicial notice of certain prior Board proceedings as to the credibility issue and Respondent Council's request for a hearing on the judicial notice matter is hereby denied.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, I hereby issued the following recommended:

ORDER[9]

A. Respondent Tri-State Building & Construction Trades Council, AFL-CIO, Ashland, Kentucky, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Entering into, maintaining, or giving effect to the multicraft agreement between it and the Tri-State Contractors Association to the extent found unlawful herein by reason of self-enforcement provisions.

(b) Threatening, coercing, or restraining Ike Stephens and Sons Construction Co., or any person engaged in commerce, or an industry affecting commerce where an object thereof is either forcing or requiring any employer to enter into an agreement which is prohibited by Section 8(e) of the Act by reason of self-enforcement provisions, or forcing or requiring Ike Stephens and Sons Construction Co., or any person, to cease doing business with any other person.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at their offices, meeting halls, and at all places where Respondent Council customarily posts notices to members a copy of the attached notice marked "Appendix A."[10] Copies of said notice to be provided by the Regional Director for Region 9, after being duly signed by an authorized representative of Respondent Council, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Council to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent Council has taken to comply herewith.

(c) Sign and deliver to the Regional Director for Region 9 sufficient copies of said notice to be furnished by the Regional Director for posting by Ike Stephens and Sons Construction Co., if willing.

B. Tri-State Contractors Association, Ashland, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from entering into, maintaining, or giving effect to, the multicraft agreement between it and the Tri-State Building & Construction Trades Council, AFL-CIO, to the extent found unlawful herein by reason of self-enforcement provisions.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at its business offices, and mail to its employer-members, copies of the attached notice marked "Appendix B."[11] Copies of said notice on forms provided by the Regional Director for Region 9, after being duly signed by an authorized representative of Respondent Association, shall be posted and mailed immediately upon receipt thereof, and those posted shall be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by Respondent Association to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order what steps Respondent Association has taken to comply herewith.

[9] In the event no exceptions are filed as provided by Sec. 102.46 the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.46 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[11] See fn. 10, *supra.*

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT enter into, maintain, or give effect to, the multicraft agreement between the Tri-State Building & Construction Trades Council, AFL-CIO, and the Tri-State Contractors Association, to the extent found unlawful by reason of self-enforcement provisions.

WE WILL NOT threaten, coerce, or restrain Ike Stephens and Sons Construction Co., or any person engaged in commerce or an industry affecting commerce where an object thereof is either forcing or requiring any employer to enter into an agreement which is prohibited by Section 8(e) of the Act by reason of self-enforcement provisions, or forcing or requiring Ike Stephens and Sons Construction Company or any person to cease doing business with any other person.

TRI-STATE BUILDING & CONSTRUCTION
TRADES COUNCIL, AFL-CIO

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT enter into, maintain, or give effect to the multicraft agreement between Tri-State Building & Construction Trades Council. AFL-CIO, and Tri-State Contractors Association to the

extent found unlawful by reason of self-enforcement provisions.

TRI-STATE CONTRACTORS ASSOCIATION